83-635

No. 83-1183

IN THE SUPREME COURT OF THE UNITED STATES

January Term, 1984

No. _____

BOYD VEENKANT, per se.,
Petitioner,
-VS -
JANNETT L. COOK (Substitution of Parties by GCR Rule 202.2 to LYDIA (COOK) DeWOLF), et al.,
Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

To The Supreme Court of the United States

from

U.S.Court of Appeals, Sixth Circuit.

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LOUIS J. CARUSO, and
GEORGE H. WELLER, Assist.Atty. Gen.,
MICHAEL T. LYBCH,
HOWARD S. SIEGRIST, per se.,
NOEL L. LIPPMAN, per se.,
Of Counsel.

File No. K 81-309

OPINION

"" NOTICE- This is cover by-Federal Civil Procedure key 1824. Courts dismissal of action under Civil Rights Act on its own motion and without giving plaintiff opportunity to be heard was plain error. Fed. Rules Civ. Proc. rule 12 (h), 42 U.S.C.A. Sec Sec. 1983,1985(2). ""

This case was filed by Plaintiff in propria persona on August 14,1981, and is presently before the Court on Motions to Dismiss by each of the Defendants. The Complaint relates a string of events beginning with an alleged agreement between Plaintiff and Stanley Cook (a/k/a Stanley Kuczynski). According to Plaintiff, he had agreed to allow Mr. Cook to sell some guns and related merchandise for Plaintiff, and had given these goods to Mr. Cook for sale purposes, sometime

prior to Mr.Cook's death in 1967. Plaintiff alleges that although he signed " dealer cost sheets" and marked them as "paid," this was done only to avoid problems Mr. Cook might have if the guns were discovered in his possession, and was not intended as receipts of sale. Plaintiff alleges that he later asked Cook to return the merchandise, but that Cook was killed before he returned the property to Plaintiff. This action arises out of Plaintiff's unsuccessful efforts to recover the property or the value thereof, which he claims is rightfully his.

Defendant Jannette Cook was the widow of Stanley Cook; she is now deceased. The other Defendants are lawyers and a judge who were involved in a state court action brought by Plaintiff against Jannette Cook. Defendant Sargent was also involved in the probate of the Sta-

-nley Cook estate.

It appears from Plaintiff's Complaint and exhibits attached thereto that on June 9, 1967 Jannette Cook filed a petition for the probate of Stanley Cook's will in the Macomb County Probate Court, alleging that the personal estate of Stanley Cook was some $1,000. In July of that year Plaintiff filed a claim in the Probate Court for the value of his property. However, on the petition of Defendant Attorney Donald Sargent, stating that there were no assets in the estate, the probate petition was dismissed on September 16,1968. Plaintiff alleges that these actions were taken despite indications which led Plaintiff to believe that Mr. Cook had assets at the time of his death, and despite the debt allegedly owing to Plaintiff by Mr. Cook at the time of his death.

Plaintiff alleges that in January 19 69, and again on an unspecified later d- ate, he went to the Cook residence to d- emand the return of his property. He a- lleges that both Defendant Cook and her sister admitted to having the property in the house but did not turn it over to Plaintiff; Defendant Cook denied that t- he property belonged to the Plaintiff. Plaintiff alleges that he then sent "the law" to recover the property for him, b- ut by that time it had been removed from the house.

Plaintiff then filed a Complaint a- gainst Jannette Cook in the District Co- urt for Macomb County, apparently on or about February 12, 1969. Plaintiff all- eges that in August of 1969 he paid Def- endant Attorney Noel Lippman a $200 re- tainer to represent him in this state c- ourt action. According to Plaintiff, h-

-owever, Lippman took no action on the case, and Plaintiff filed a complaint w-ith the Michigan State Bar Association. The State Bar Grievance Board then advi-sed Plaintiff by letter in February 1975 that Lippman had been suspended from the practice of law for five years as of De-cember, 1974. Plaintiff alleges that despite this, Lippman wrote to him on M-arch 12, 1975, asking Plaintiff to come in to discuss his case. The Complaint does not disclose what happened at that time, except that it appears that an Am-ended Complaint was filed in the Macomb County District Court on March 24, 1975, signed by Defendant Attorney Howard S. Siegrist on behalf of Plaintiff. Plain-tiff alleges that he never engaged Sie-grist to represent him, and that he had no knowledge of the amendment of his C-omplaint until he received a copy of the

Amended Answer at the end of October 19 75. At that time, Plaintiff wrote to the Macomb County District Court inquiring about the status of his action and advising the Court that neither the Amended Complaint nor Siegrist's appearance was authorized by Plaintiff. Plaintiff alleges that the Amended Complaint was fraudulent.

Plaintiff alleges that he was notified sometime later that his case would be dismissed if no action was taken on it. Plaintiff states that he then hired Attorney John Watts, who moved for the retention of the case on the grounds that Plaintiff had been hampered in obtaining representation. In response, Defendant Attorney Sargent filed an answer which stated that the merchandise in question had been purchased by Mr. Cook between 1961 and 1963; that Plaintiff h-

-ad filed a claim in probate; and that any claim should be heard in probate. On April 18,1978, over nine years after the action was originally filed by Plaintiff , Defendant District Court Judge Sherman P. Faunce II heard and denied Plaintiff's Motion for Retention. Over three years later, Plaintiff filed this federal action.

I. Jannette L. (Kuczynski) Cook

On November 24, 1981, Lydia Helen DeWolf, personal representative of the estate of Jannette Cook, specially appeared in this action claiming that service on Jannette Cook was ineffective; that the statut of limitations bars any action by Plaintiff against this Defendant, her estate or personal representative; that venue in the Western District of Michigan is improper; and that for various reasons Plaintiff fails to state a

claim as to this Defendant or her successors.

Plaintiff named Jannette Cook as the Defendant in this action filed August 14, 1981, although Cook had died on April 20, 1980. (Exhibit A, Special Appearance and Motion to Dismiss...). Plaintiff states that upon learning of Defendant Cook's death, he obtained information that Attorney Stephen Schoenberg represented the estate, and Plaintiff sought to serve that attorney. Defendant confirms that the Summons and Complaint were delivered to the offices of Cummings, McClorey, Davis & Acho, P.C., on that date, but argues that such service was improper. The Court agrees that Defendant Cook has not effectively been made a party to this action.

A claim for a debt against the estate of Jannette Cook might have been br-

-ought against her personal representat-ive. See MCLA §§ 700.701(1); 700.741. Or, if the action had been pending against Defendant Cook at the time of her death, the personal representative could have been seved and admitted to defend the action. MCLA § 700.742; FRCP 25(a). However, service of the Summons and Complaint on the attorney for the estate is ineffective here for two reasons: Jannette Cook could not be sued becouse she was dead (See FRCP 17(b); MCLA § 600.2051(1)); and service on an agent of a party is not sufficient unless the agent is specifically authorized to accept service or is appointed by law for that purpose. (FRCP 4(d)(1)). Plaintiff's Motion for Substitution of Parties pursuant to FRCP 25(a) is of no assistance to him in this case, becouse:

The rule presupposes that substitu-

tion is for someone who was a party to a pending action. Substitution is not possible if one who was named as the party in fact died before the commencement of the action. 7A Wright and Miller, Federal Practice and Procedure: Civil ■ 1951, p 638. Becouse this Defendant was never effectively made a party to this lawsuit, dismissal of Plaintiff's Complaint as to Defendant Jannette Cook is appropriate.

In addition to the failure of Plaintiff to make Defendant Cook, her personal representative, or her estate a Defendant in this action, the statute of limitations barred Plaintiff's claims againt Defendant Cook at the time this lawsuit was filed, and clearly bar any action against Defendant Cook's personal representative or estate at the present time. It is difficult to discern the

legal grounds for Plaintiff's claims against Defendant Cook, but reading the Complaint in the light most favorable to Plaintiff, it appears that Plaintiff has sought to allege claims of fraud; conversion; and deprivation of property without due process of law, in violation of 42 USC §§ 1983, 1985(3), and 1986.[1] The statute of limitations in Michigan for the tort of fraud is either three or six years, depending upon whether or not there is injury to person or property. MCLA § 600.5813; MCLA § 5805(8); See Case v Goren, 43 Mich App 673 (1972). A conversion claim must be brought within three years. MCLA §5805(8); Janiszowski v Behrmann, 345 Mich 8 (1956). The statute of limitations in § 1986 actions is defined by the statute itself, and is one year. And generally, claims under §§ 1983 and 1985(3) have been fou-

-nd to be governed by Michigan's three year statute of limitations. See Gordon v City of Warren, 579 F 2d 386 (CA 6 19 79); Krum v Sheppard, 255 F Supp 994 (WD Mich 1966), aff'd 407 F 2d 490. Plaintiff's claim against Defendant Cook arise out of Defendant's alleged refusal to return Plaintiff's property and the alleged removal of the property from her house sometime around 1969, and Defenda- nt Cook's statements in the petition for probate filed in 1968. Even a six year statute of limitations had long expired when Plaintiff filed this action in 1981. Clearly Plaintiff will be unable at this time to bring any claim against Defenda- nt Cook's personal representative or es- tate on these grounds. Plaintiff argues that the instant action is merely a con- tinuation of his state court lawsuit, w- hich was not time barred when commenced

in 1969. However, the present action was commenced originally in federal court in 1981. The fact that it is based on the same circumstances does not make it the same action for statute of limitations purposes.

Becouse Defendant Cook was never properly made a party Defendant to this action, and becouse it appears from the face of Plaintiff's Complaint that claims against this Defendant or her successors are time barred by the applicable statutes of limitations, Plaintiff's claims against Defendant Cook are dismissed with prejudice. [2]

II. Judge Sherman Faunce, II

Defendant Michigan District Judge Sherman P. Faunce, II filed a Motion to Dismiss Plaintiff's claims as to him, on October 18, (?), 1981. Defendant Faunce argues that Plaintiff's Complaint m-

-ust be dismissed becouse it is barred by the statute of limitations, and becouse Defendant is immune from liability.

It is clear from the face of the Comp-laint that Plaintiff's allegations as to this Defendant involved conduct which occured on or before April 18, 1978, when Defendant Faunce denied Plaintiff's Motion for Retention of his state court action and dismissed the cause for lack of progress. Becouse this was an action taken by Defendant in his judicial capacity, he is absolutely immune from liability for damages even if his ruling was in error. Stump v Sparkman, 435 US 349, 359 (1978). In addition, it appears that any claims against this Defendant for violations of the civil rights statutes are barred by the statute of limitations, since this action was filed over three years after the judge's 1978 rul-

ng. Plaintiff's Complaint as to Defendant Faunce is therefore dismissed with prejudice.

III. NOEL LIPPMAN

Defendant Lippman has also moved for dismissal of Plaintiff's Complaint on the grounds that the applicable statutory periods of limitation have expired so as to preclude any claims by Plaintiff against him.

It appears that Defendant Lippman first became involved in the dispute between Plaintiff and Defendant Cook when Plaintiff retained Lippman to represent him in state court, in August of 1969. The Complaint contains no allegations of any continued relationship between Plaintiff and this Defendant after March 19 75. However, assuming that Plaintiff's claims against Defendant arise out of the dismissal of his state court action

in 1978, the Court will view that date as the time at which Plaintiff's cause of action against this Defendant accured. Reading the Complaint in the light most favorable to Plaintiff, the Court will assume that Plaintiff intends to state claims of limitations in actions for malpractice is two years. MCLA §600.5805 (4). As has been noted above, the relevant statutes of limitations for civil rights actions allow a plaintiff no more than three years to file his action.

Since more than three years had expired at the thime this action was commenced, Plaintiff's claims against this Defendant are time barred, and his complaint as to this Defendant is dismissed with prejudice.[3]

IV. Howard S. Siegrist

Defendant Siegrist filed his Motion to Dismiss on October 26, 1981, also on

the grounds that Plaintiff's action as to him is barred by the applicable statutes of limitations. Defendant Siegrist is the attorney whose name appears as Plaintiff's representative on an amended complaint filed in Plaintiff's state court action on March 24, 1975. While Plaintiff has not clearly alleged how, if at all, he was injured by the filing of the amended complaint, the Court will assume for the purpose of this motion that Plaintiff has stated claims of civil rights violations and fraud against this Defendant. Becouse the Complaint in this action was filed more than six years after the filing of the amended complaint, Plaintiff is barred from bring this action against Defendant Siegrist, and his Complaint as to this Defendant is dismissed with prejudice.

Defendant Attorney Sargent represented Defendant Cook in Plaintiff's state court proceedings, and also requested that the probate petition for Stanley Cook be dismissed. He has moved for dismissal solely on the basis of improper venue, pursuant to 28 USC § 1406(a). It does appear that venue for this action does not properly lie in the Western District of Michigan. All of Defendants appear to reside in the Eastern District of Michigan; the probate of Stanley Cook's estate took place in Eastern Michigan; Plaintiff's state court action was brought in the Eastern District of Michigan; and Defendant Cook resided in the Eastern District of Michigan when she allegedly converted Plaintiff's property. Becouse this is an action which is not, and could not be, based solely upon diversity jurosdiction, venue is proper

only in the Eastern District of Michigan . 28 USC § 1391(b).

28 USC § 1406(a) provides that where a case is filed in the wrong district, the Court may dismiss the action, or "if it be in the interest of justice" the Court may transfer the case to the distict in which the action should have been brought. In this case, while Defendant Sargent has not moved for dismissal for failure to state a claim, or becouse the statute of limitations bars the action, it appears that either of these defenses would result in dismissal with prejudice against Plaintiff. For that reason, it would not be in the interest of justice to transfer this action to the Eastern District of Michigan and Plaintiff's action against Defendant Sargent is therefore dismissed. And becouse it appears from the face of the Complai-

-nt that Plaintiff's civil rights claims against this Defendant are barred by the statute of limitations, and that Plaintiff fails to state a cause of action for fraud against this Defendant, the dismissal is with prejudice.

VI. Conclusion

For the reasons set forth above, Plaintiff's Complaint is dismissed with prejudice as to all Defendants.[4] Because dismissal is appropriate, it is not necessary to decide Plaintiff's Motions for Summary Judgment, filed October 19 and 23, 1981. A careful review of those motions does not reveal any basis for denying the motions to dismiss, nor does it appear that summary judgment could have been granted in Plaintiff's favor. Plaintiff also requests in a motion filed October 19,1981, that this Court convene a grand jury to review the alleged

misconduct of Defendant Lippman. Two grand juries are currently in session in this District, obviating the need for the Court to consider this motion. If Plaintiff wishes to get a Complaint before the grand jury, he must go through the United States Attorney's Office. That office will only refer cases to the grand jury where there is a report from an investigative agency demonstrating evidence of criminal activity within this District. Plaintiff is therefore directed to the Federal Bureau of Investigation to seek investigation of any claims.

Dated: Feb.4,1983. Richard A. Enslen
Richard A. Enslen
US District Judge

FOOTNOTES

[1]Plaintiff's allegations of criminal conduct, scattered throughout his Complaint, are of course outside the scope of this Court's jurisdiction in a civil

action, and are not further considered. Plaintiff has also alleged violations of 42 USC §1988, but that section does not set forth an independant cause of action. Rather, it functions as a complement to the other civil rights provisions. See Moor v Alameda County, 411 US 693, 702 (1973).

[2]Becouse these issues are dispositive of Plaintiff's claims against Defendant Cook, the Court need not discuss Defendant's other proposed grounds for dismissal. However, the Court notes that it does appear that venue does not lie in the Western District of Michigan, and that Plaintiff has not adequately alleged a claim of fraud against this Defendant.

[3]Plaintiff has alleged in his answer to Defendants motion, that Defendant's affidavit is made in bad faith and therefore Plaintiff is entitled to summary

judgment. Grant of summary judgment is not the appropriate remedy when affidavits are submitted in bad faith. FRCP 56 (g). Moreover, Plaintiff has not demonstrated how Defendant has in bad faith stated facts with specific regard to this motion. In fact, the basis of this motion is Plaintiff's own Complaint. Any bad faith which may have occurred during the course of the attorney-client relationship between Plaintiff and this Defendant, does not affect the merits of Defendant's arguments in the instant motion.

4 While dismissal of this action is largely based upon statute of limitations grounds, it also appears that this action was commenced in an improper venue; the presence of this Court's jurisdictional minimum of damages, is likewise

dubious. Moreover, while this Opinion assumes for the purpose of the motions that Plaintiff states claims against the Defendants, it is not at all clear that that is the case.

"" PREJUDICE - IN LAW, without dismissal of or detriment to a legal right, claim, or the like.

A opinion held in disregard of facts that contradict it; unreasonable bias ""